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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. CLARENCE NMN HORTON III, Petitioner.	2 CA-CR 2008-0134-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR-20060286 and CR-20060287

Honorable Richard S. Fields, Judge

REVIEW GRANTED; RELIEF DENIED

Clarence Horton III — Globe
In Propria Persona

P E L A N D E R, Chief Judge.

¶1 Petitioner Clarence Horton challenges the trial court's partial denial of relief on his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review but deny relief.

¶2 Pursuant to a plea agreement, Horton was convicted of two counts of armed robbery. The agreement provided for a "sentencing range" on each count from a presumptive, five-year term of imprisonment to a substantially aggravated, 12.5-year term. The trial court imposed concurrent, partially aggravated, six-year terms.

¶3 Horton filed a notice of post-conviction relief, citing an error in the calculation of his credit for presentence incarceration time; the fact that he had received an aggravated sentence despite having presented evidence of mitigating factors; and his trial counsel's "minimal" communication with him. The trial court appointed counsel, who filed a petition for post-conviction relief stating that Horton's only meritorious argument was his claim that he had been awarded too little presentence incarceration credit. Counsel therefore requested that Horton be allowed to file a pro se petition if he desired. *See* Ariz. R. Crim. P. 32.4(c)(2); *see also State v. Smith*, 184 Ariz. 456, 459, 910 P.2d 1, 4 (1996) ("If, after conscientiously searching the record for error, appointed counsel in a [Rule 32] proceeding finds no tenable issue and cannot proceed, the [pleading] defendant is entitled to file a pro per [petition].").

¶4 Horton filed his pro se petition, arguing trial counsel had been ineffective in failing to properly urge various mitigating factors at sentencing. The trial court granted Horton the additional presentence incarceration credit he had requested but denied the petition in all other respects. This petition for review followed. We will not disturb the trial court's ruling unless the court clearly abused its discretion. *State v. Mata*, 185 Ariz. 319,

331, 916 P.2d 1035, 1047 (1996); *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no such abuse here.

¶5 Without citing any authority, Horton points out that the trial court "took 5 months to rule" and asserts this "failure to rule in a timely manner should be grounds [for] automatically granting the petition." The court ruled on Horton's October 2007 petition in March 2008. But Horton did not object to that delay below. Rather, in January 2008, he merely asked the court to rule on the issue of his presentence incarceration credit because the state had not addressed that in its response. And Horton has not shown how the delay in the court's ruling is a ground for relief under Rule 32.1.

¶6 Horton also argues for the first time on review that "the Prosecutor and Judge made reference to [the sentence his] co-defendant [had] received at sentencing." He contends that reference was intended "for the purpose of an aggravated sentence." This court does not consider issues that have neither been presented to nor ruled on by the trial court and are raised for the first time in a petition for review. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (petitioner may not present new issues on review). Therefore, we do not address this argument.

¶7 Finally, to the extent Horton might be urging, in his pro se petition below and his petition for review, ineffective assistance of counsel or suggesting that the trial court abused its discretion in imposing an aggravated sentence, the record does not support such claims. To be entitled to relief on a claim of ineffective assistance of counsel, Horton was

required to show both that counsel's performance fell below an objectively reasonable professional standard and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). If a petitioner fails to establish either prong of the *Strickland* test, the claim necessarily fails. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

¶8 Horton has not shown his trial counsel's performance fell below an objectively reasonable professional standard. By pleading guilty, Horton waived claims of ineffective assistance of counsel except those related to entry of the plea or to errors in sentencing. *See State v. Quick*, 177 Ariz. 314, 316, 868 P.2d 327, 329 (App. 1993); *cf. State v. Phillips*, 139 Ariz. 327, 329, 678 P.2d 512, 514 (App. 1983) ("[I]t is clear that where the objection is to the validity of the sentence imposed, such an objection is not waived by a guilty plea."). Horton alleged below only that counsel's performance at sentencing was ineffective in that counsel did not "explain all the mitigating factors to the Court." But Horton's counsel did in fact present the court with all of the mitigating evidence Horton set forth in his petition below.

¶9 We also reject Horton's implicit assumption that he was entitled to the presumptive sentence merely because the mitigating factors presented at sentencing outnumbered the aggravating factors. "The balancing of the aggravating and mitigating circumstances in determining a sentence is not based upon mere numbers of aggravating or mitigating circumstances." *State v. Walton*, 133 Ariz. 282, 295, 650 P.2d 1264, 1277 (App.

1982). Rather, a "[t]rial judge[], when sentencing a defendant, must consider all statutory and relevant non-statutory mitigating factors that a defendant proffers." *State v. Van Adams*, 194 Ariz. 408, ¶ 50, 984 P.2d 16, 30 (1999). The judge then has discretion "to determine the weight to be given each mitigating factor proven by a preponderance of the evidence." *Id.* We cannot say the trial court abused its discretion in weighing the mitigating and aggravating factors presented to it. Accordingly, although we grant the petition for review, we find no abuse of the trial court's discretion and, therefore, deny relief.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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PETER J. ECKERSTROM, Judge